

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JESSE T. GILMORE,

Petitioner,

v.

Civil Action No. 5:18CV90
(STAMP)

JENNIFER SAAD, Warden,

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Procedural History

The pro se¹ petitioner, Jesse T. Gilmore, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. ECF No. 1. The petitioner was then incarcerated at FCI Gilmer in Glenville, West Virginia. In his petition, petitioner alleges that due to a "Subsequent, Retroactive change in the Statutory interpretation by the United States Supreme Court in Mathis v. United States, 136 S. Ct. 2243 (2016)[,]" his Commonwealth of Virginia drug conviction fails to categorically qualify as a "federally Controlled Substance element that is included within the felony drug offense definition Set forth in 21 U.S.C. § 802(44), under the Statutory enhancement Provision of 21 U.S.C. § 851, § 841(b)." ECF No. 8-1 at 1-2 (internal quotation marks omitted); ECF No. 1-1 at 1-2.

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1416 (10th ed. 2014).

Specifically, the petitioner requests that "this Court Vacate his Sentence and Order An immediate Release[.]" ECF No. 8-1 at 1; ECF No. 1-1 at 1.

This civil action was referred to United States Magistrate Judge James P. Mazzone under Local Rule of Prisoner Litigation Procedure 2. Magistrate Judge Mazzone issued a report and recommendation (ECF No. 20) recommending that the petitioner's petition (ECF No. 1) be denied and dismissed without prejudice. The petitioner did not file objections to the report and recommendation. For the following reasons, this Court affirms and adopts the report and recommendation in its entirety.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to findings where no objections were made, such findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Because the petitioner did not file any objections to the report and recommendation, the magistrate judge's findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

In his report and recommendation, the magistrate judge correctly noted that the petitioner has not met the second prong under the Wheeler² test – that the “settled substantive law [that established the legality of his sentence] changed and was deemed to apply retroactively on collateral review.” ECF No. 20 at 7. The magistrate judge cited several cases within the United States Court of Appeals for the Fourth Circuit and elsewhere that have held that Mathis does not represent a substantive change in the law. Id. at 7-8. Upon review, the magistrate judge, concluded that this Court does not have jurisdiction to consider the petition. Id. at 8-9. Thus, the magistrate judge recommended that the petitioner’s petition (ECF No. 1) be denied and dismissed without prejudice. Id.

Upon review, this Court finds no clear error in the determinations of the magistrate judge and thus upholds his recommendation.

IV. Conclusion

For the reasons set forth above, the report and recommendation of the magistrate judge (ECF No. 20) is AFFIRMED and ADOPTED in its entirety. Accordingly, the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (ECF No. 1) is DENIED and DISMISSED WITHOUT PREJUDICE.

²United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).

This Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

It is ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: July 30, 2019

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE